United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1371

To be argued by
ROBERT E. GOLDMAN

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P/S

United States Court of Appeals

For the Second Circuit

UNITED STATES OF AMERICA,

Appellant,

v.

SALVATORE COLETTA,

Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of New York

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BRIEF FOR SALVATORE COLETTA

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Preliminary Statement

Salvatore Coletta was indicted and charged with four counts of tax evasion, for the years 1968 through 1971, respectively (26 U.S.C. §7201). Although indicted with two other individuals,* there was no charge of conspiracy nor any charge premised upon aiding and abetting. Thus, the

* The indictments against the two other defendants were dismissed, *i.e.*, George Gamaldi, by the court (Honorable Henry F. Werker, United States District Judge) after conclusion of the government's case, and Blase Iovino, upon motion by the government due to lack of venue in the Southern District of New York.

allegation was tax evasion, premised upon the named individual actually receiving the amount of unreported income set forth in the indictment and willfully failing to report it.

Upon the lack of a conspiracy charge or any charge premised upon aiding and abetting, coupled with the government's assertions in open court that there appeared no basis therefor, the trial court granted a severance to each of the defendants.

The Gamaldi case was selected by the government to be tried first, and commenced on November 17, 1975. At the close of the government's case, with the only fact witnesses produced being Moe Steinman and his brother, Sol Steinman, Judge Werker granted Gamaldi's motion to dismiss the indictment. In so doing the court stated that venue was lacking as to three of the four counts, and in any event the evidence was too speculative and legally inadequate as to all of the counts (Tr. 361).*

Approximately five months after the dismissal of the Gamaldi indictment, the government acknowledged that the evidence against Coletta was in all material respects similar to that it had presented against Gamaldi, and that it would stipulate to that effect to permit Coletta to move for dismissal. The stipulation (A. 25), entered into on April 7, 1976, included the additional mechanical details that during the years in question Coletta reported income totalling $480,498, upon which he paid taxes of $172,620, and that

* "Tr." refers to the transcript of the trial in the case of *United States* v. *George Gamaldi*; "A." refers to the appellant's appendix; "G.B." refers to the government's brief submitted in support of this appeal.

Coletta, having denied the receipt of any kickbacks or improper payments, further acknowledged that no portion of his reported income was derived from such a source. With the government's consent, Coletta then moved to dismiss the indictment for failure to make out a *prima facie* case or, alternatively, because no jury, presented with that evidence, could reasonably conclude guilt beyond a reasonable doubt.

The trial court granted that motion stating in its written opinion (A. 55-60):

> "But the government has not been able to document the specifics of who was involved, how much was paid, and where and when payment took place of any one particular transaction."*
>
> • • •
>
> "The government's case against Gamaldi was replete with insufficient, speculative generalities instead of specific concrete evidence. These shortcomings have not disappeared; the facts and the evidence as presented now against Coletta remain exactly the same as they were against Gamaldi—highly inadequate."

It is from the above dismissal that the government has taken the instant appeal.

Statement of Facts

The government's principal witness was Moe Steinman, who by his own testimony was a long-time associate of racketeers (Tr. 117-18), liar (Tr. 262), and repeated pur-

* The testimony at the trial alleged 36 transactions.

veyor of false stories about non-existent kickbacks to supermarket buyers in order to extract money from meat suppliers, which totally went into his own pocket (Tr. 137-38, 285-86).*

At the time of the trial and for a number of years prior, Steinman was employed as head of labor relations for Daitch-Shopwell supermarkets. He was also the principal and guiding force of Transworld, Hersol and Antor meat brokerage companies (Tr. 82, 84, 85, 283, 285, 323). Although he referred to himself as a salesman (Tr. 81), Steinman was paid a commission by the Iowa Beef Company, the world's largest beef processor, on every pound of boxed beef sold by that company within a 125 mile radius of Columbus Circle (Tr. 103), although he was at a loss to explain what he or any of his family had done to obtain or justify such remuneration (Tr. 103-110). Steinman acknowledged that he told the principals of Iowa Beef that his commission should be enlarged since he had to pay supermarket buyers kickbacks in order to induce purchases (Tr. 137). Although he received the sums requested upon that representation, Steinman acknowledged that, in fact, he paid no such kickbacks whatever and pocketed the money himself (Tr. 137-38). Sol Steinman further testified that

* As discussed in Point A of the Argument, the trial court did not consider credibility and the defendant recognizes that credibility is essentially a question for the jury. However, when the government witness acknowledges that he has been an habitual liar (Tr. 262) and that his lies repeatedly are to the effect that he made payoffs to supermarket buyers when, in fact, none were made (Tr. 137, 285) the question arises if that might not properly be considered as a factor by this Court as elevating the circumstances in this case to a degree that makes it a matter of law or, alternatively, upon the question of limitation of jury speculation. The court is respectfully referred to Point B of the Argument herein.

this was a regular practice in dealing with suppliers in addition to Iowa Beef (Tr. 311), and that the money would be pocketed by Moe Steinman, with the exception of a few dollars which Moe gave to Sol. Sol Steinman further testified that the same fictitious story even extended to Moe Steinman telling Moe and Sol's partner, Herbert Newman, that non-existent kickbacks had to be made to the Daitch-Shopwell buyer in order to personally extract a larger share of the partnership income from Transworld (Tr. 285-86). Similarly, such payoffs were never made (Tr. 139, 285).

Moe Steinman testified that he paid an average of $23,000 per month to two of three original defendants, *i.e.*, Gamaldi and/or Iovino and/or Coletta. He did not specifically identify Coletta as the recipient of any payments.* The payments, whose actual amount were not identified (Tr. 51), were made at various places, which were not identified with regard to the payments allegedly made. Neither was the date of any single payment specifically identified, beyond it being in approximately the first ten days of each month (Tr. 202). No testimony was offered as to the time of any payment.

The government produced no record of any kickbacks or of the source of the money allegedly paid to Coletta and the others, the records which had allegedly existed as to both having been destroyed—those of kickbacks, by Moe and Sol Steinman (Tr. 286), and those that would have shown the conversion activities that allegedly generated the

* The Court's indulgence is respectfully requested. The nature of the appeal herein focusing on the government's lack of evidence, is necessary in the statement of fact to identify necessary evidence that was not presented.

necessary cash for the kickbacks, by an unexplained and unsolved act of vandalism that occurred at the Transworld offices on the eve of the execution of a search warrant by the District Attorney's Office of New York County (Tr. 180-81, 287-88). In the absence of those records, Moe Steinman stated that he was unable to offer more than the generalities he had already provided.

In lieu of any evidence that directly showed Coletta receiving payments, the government offered a conversation between Moe Steinman, Coletta and Iovino as to past kickbacks being paid with which Coletta and Iovino had no connection, that purportedly took place during an accidental meeting in Puerto Rico in the year 1968 (Tr. 40). No details as to the method or amount of any kickback plan were discussed at this meeting (Tr. 41).

The only other significant event testified to by Steinman was an alleged meeting at Coletta's house with Gamaldi, Iovino and Coletta years later at which a kickback was purportedly paid, but again there was no direct testimony that Coletta received any money (Tr. 60-61, 246-50).*

The government offered no evidence of net worth not explained by reported income, nor of any expenditures or disbursements that could not be similarly accounted for.**

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* This meeting was rebutted and contradicted in every material regard including the year of its occurrence, as well as on what day of the week it took place, by the only other government fact witness, Sol Steinman (Tr. 276-77).

** While the failure to produce such evidence occurred in the Gamaldi case—the same is true here by virtue of the stipulation. The government has not suggested that any such evidence exists as to Coletta.

ARGUMENT

The District Court properly dismissed the indictment.

A. Insufficiency of the Evidence

Though the procedural posture upon which this case comes before the Court for review is by appeal by the government, pursuant to 18 U.S.C. §3731, of the order granting a pre-trial motion to dismiss the indictment under the provisions of Rule 12(b), Fed. R. Crim. P., the basis of that dismissal indicates that it must be tested against the standards applicable to the entry of a judgment of acquittal under Rule 29, Fed. R. Crim. P.

At the suggestion of the government, and with the agreement of Judge Werker and defense counsel, the motion to dismiss was based upon the claimed insufficiency of the evidence presented at the trial of George Gamaldi, a previously severed co-defendant, which was stipulated to be similar in all material respects to that to be offered against Coletta (G.B. 2; A. 25). Judge Werker had ordered a judgment of acquittal* in the Gamaldi case at the close of the government's evidence because he found it insufficient (Tr. 361), but the government did not appeal that order since it determined that such an appeal was barred (G.B. 2). It

* Though neither defense counsel the Strike Force attorney nor Judge Werker referred to the order as being one of a judgment of acquittal, Judge Werker rather stating that upon motion at the end of the government's case, he was dismissing the indictment (Tr. 363), the procedural setting clearly indicates that it was a judgment of acquittal that was ordered. As such, it is of no moment that the designation describing the order might have been inaccurate. *United States* v. *Sisson*, 399 U.S. 267, 270, 90 S.Ct. 2117, 26 L.Ed.2d 608 (1970).

now appeals the dismissal of the Coletta indictment, however, based upon the same finding by Judge Werker.

In *United States* v. *Taylor*, 464 F.2d 240, 242 (2d Cir. 1972), this Court overruled its much eroded holding of *United States* v. *Feinberg*, 140 F.2d 592, 594 (2d Cir.), *cert. denied*, 322 U.S. 726, 64 S.Ct. 943, 88 L.Ed. 1562 (1944), that the standard of evidence necessary to send a case to the jury is the same in civil and criminal cases, even though the jury must apply a higher standard before rendering a verdict in favor of the proponent in the latter. In its place, the court adopted the rule, formulated by Judge Prettyman in *Curley* v. *United States*, 81 U.S. App. D.C. 389, 160 F.2d 229, *cert. denied*, 331 U.S. 837, 67 S.Ct. 1511, 91 L.Ed. 1850 (1947), that a trial judge, in passing upon a motion for a judgment of acquittal:

> "' . . . must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If he concludes that upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion; or, to state it another way, if there is no evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt, the motion must be granted. If he concludes that either of the two results, a reasonable doubt or no reasonable doubt, is fairly possible, he must let the jury decide the matter. (footnotes omitted)' "
> *United States* v. *Taylor, supra*, 464 F.2d at 241, quoting *Curley* v. *United States, supra*, 160 F.2d at 232-33.

The present case is not one in which an appellant asserts that the trial judge misapprehended the appropriate stand-

ard in determining a motion for a judgment of acquittal. See, *e.g.*, *United States* v. *Brawer*, 482 F.2d 117 (2d Cir. 1973). Rather, Judge Werker's opinion makes it clear that his decision was reached by putting the sufficiency of the evidence to the test that the requirements of the *Taylor* rule mandate and determining that it fails that test (A. 58). The government contends, however, that in spite of Judge Werker's recognition of the proper rule of law and assertion that he was applying it, he, in fact, did not apply it (G.B. 9). We contend that he did.

At the basis of the government's reasoning is the conclusion that Judge Werker did not give full play to the right of the jury to determine credibility or draw justifiable inferences of fact (G.B. 13). The government specifically points to language in the memorandum opinion which indicates that the government was unable to document the specifics of who was involved, how much was paid, and where and when payment took place, and that Moe Steinman's testimony was uncorroborated and nullified on cross-examination. This, in addition to the conclusion that there was a failure to show, even circumstantially, actual receipt of funds by Coletta, is what the government attributes as the reasons for dismissing the indictment (G.B. 11-12). In so doing, however, the government ignores the legal implications of those defects.

The language concerning lack of specificity, uncorroborated testimony and nullification of testimony on cross-examination is contained in the context of Judge Werker's analysis of the evidence presented. Though these deficiencies are noted, they are merely symptoms, not causes, of the finding of insufficiency, and are not necessary to it. The

actual reason for that finding, as articulated by Judge Werker, was the necessity of the jury to rely on conjecture, speculation and inference beyond that which the evidence justified (A. 58-59).

A finding of such necessity can be made independently of any considerations such as credibility, which are properly the jury's to make. As Judge Werker found, the evidentiary insufficiency is not based upon what the government presented but was unbelievable, but rather upon what it was necessary for the government to present to support the inferences it asked the jury to draw, especially to prove the receipt of a substantial amount of unreported funds, but was omitted (A. 58).

A trial judge need not give a jury the unfettered leeway to base a conclusion of guilt beyond a reasonable doubt on *any* inferences of fact, but only on *justifiable* ones. *United States* v. *Taylor, supra,* 464 F.2d at 243. Certainly inferences cannot be built upon non-existent evidence, *United States* v. *Rappaport,* 312 F.2d 502, 504 (2d Cir. 1963), nor upon other inferences which have been impermissibly drawn. *United States* v. *Grow,* 394 F.2d 182 (4th Cir.), *cert. denied,* 393 U.S. 840, 89 S.Ct. 118, 21 L.Ed.2d 111 (1968). Though inferences based upon preceding permissibly drawn inferences are not necessarily invalid or impermissible, their probative value is certainly affected by the length of the chain of inferences necessary to establish them, *United States* v. *Ravich,* 421 F.2d 1196 (2d Cir.), *cert. denied,* 400 U.S. 834, 91 S.Ct. 69, 27 L.Ed.2d 66 (1970), because of the proportionate increase in the chance of error or speculation as the gap between underlying fact and ultimate conclusion

widens. *United States* v. *Shahane*, 517 F.2d 1173 (8th Cir.), *cert. denied* —— U.S. ——, 96 S.Ct. 191, 46 L.Ed.2d 124 (1975).

Such a circumstance has been specifically recognized as one to be considered by a trial judge in ruling on the sufficiency of evidence. In *United States* v. *Weinstein*, 452 F.2d 704, 713-714 (2d Cir. 1971), *cert. denied, Grunberger* v. *United States*, 406 U.S. 917, 92 S.Ct. 1766, 32 L.Ed.2d 116 (1972), this Court noted that there were unusually strong grounds for not believing the main government witness, but stated that that decision was the jury's function, not the judge's. Significantly, however, after referring to authority in support of that principle, the court appended the following caveat:

> "When proof with respect to an essential element of the crime is circumstantial the judge may have a larger role with respect to sufficiency, since he must determine whether the web of inferences the prosecution seeks to have the jury draw has been spun too far." *Id.* at 714 n.13.

In making such a determination, a judge must reject any inference relied upon to establish an element of a crime unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend, *Leary* v. *United States*, 395 U.S. 6, 36, 89 S.Ct. 1532, 1548, 23 L.Ed.2d 57, 82 (1969); *United States* v. *Tavoularis*, 515 F.2d 1070, 1075 (2d Cir. 1975).*

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* The inference, rather than merely meeting the "more likely than not test," may even have to satisfy the stricter "beyond a reasonable doubt" test of *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed. 2d 368 (1970). See discussion in *United States* v. *Tavoularis*, *supra*, 515 F.2d at 1075, n.10 and n.11. Since it is submitted that not even the less stringent test has been met in the instant case, that unsettled issue is not argued further here.

Judge Werker found (A. 58), and the government apparently concedes (G.B. 10), that the receipt of a substantial amount of unreported funds is necessarily based upon inferences to be drawn from circumstantial evidence. As such, he correctly made an initial determination as to the attenuation of the prosecution's "web of inferences", and concluded that it had, indeed, been "spun too far." *United States* v. *Weinstein, supra,* 452 F.2d at 714. As Judge Prettyman envisioned in the decision from which this circuit's standard in this area is drawn, the determination as to whether a reasonable mind might fairly conclude guilt beyond a reasonable doubt, "particularly [in a case of] circumstantial evidence . . . may depend upon the difference between pure speculation and legitimate inference from proven facts". *Curley* v. *United States, supra,* 160 F.2d at 233. This is precisely the difference that Judge Werker found to exist in this case in ruling that the inferences that must be ultimately drawn would have to be based upon conjecture, speculation and even speculation upon speculation (A. 59).

In sum, the evidence presented by the government, excluding considerations that are properly for a jury to determine, was insufficient, without resort to unjustifiable inferences, upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt. As such, Judge Werker properly dismissed the indictment.

B. Due Process, Fair Trial and Justice

The instant case is a prosecution for tax evasion wherein: (1) no direct evidence was presented as to the actual receipt of money by Coletta; (2) no direct evidence

was presented as to the amount of money actually received, if in fact, any was received; (3) no direct evidence was presented as to the year in which any money was received; (4) no evidence was presented as to unexplained net worth of Coletta; and (5) no evidence was presented as to unexplained expenditures by Coletta. As shown in Point A of this Argument, there was lacking sufficient facts from which a jury could reasonably conclude the actual receipt of money by Coletta, the amount that he received, the year in which he received it and that he wilfully intended to evade taxes, without resort to conjecture and speculation, no direct proof being offered as to those essential elements. Neither was there evidence which attributed to Coletta's unexplained net worth or expenditure, which are two circumstances permitting reasonable inferences as to the receipt and failure to report income. Thus, the basic "facts" from which the jury would be required to embark upon their infinite speculations were vague and in every instance unspecified as to the fundamental requisites of time, date and place.* Additionally, as will be shown, the "story" told by the uncorroborated government witness was inherently incredible.**

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* If a place was mentioned, it lacked a date; if a month was mentioned, it lacked a time and a place; and if a year is mentioned, it lacked an amount, a date and a place.

** The proposition that issues of credibility are jury, not judge questions, recognized in Point A of this Argument, has been viewed to bend somewhat on a motion for a judgment of acquittal when the "testimony is so in conflict or improbable as to be incredible as a matter of law." *United States* v. *Brooks*, 349 F.Supp. 168, 171 (S.D.N.Y. 1972) (Brieant, J.). The statement by Judge Weinstein in denying a similar motion, quoted in *United States* v. *Weinstein*, *supra*, 452 F.2d at 707 n.3, that he would not grant the motion on the ground that the main government witness was "inherently incredible" because he did not find that specific witness to be so, implies that a finding of inherent incredibility would produce the opposite result.

Mathematical computation* shows, for example, that in the year 1968, the "kickbacks" were a minimum of 27.7% of the cost of the meat purchased (if Hersol and Antor are

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*

	Gross Billings (including alleged "kickbacks")	*Gross Sales (without add-on for "kickback")*	*Amount of Kickback*	*Amount Needed to Be Added to Bill to Generate Sufficient Cash for Kickback*	*% Added on to Each Pound of Meat Purchased by Hills*
1968	$ 894,682	$ 639,682	$207,500	$227,750 ($207,750 + 10%)	35.6%
1969	$1,260,778	$ 956,078	$277,000	$304,700 ($277,000 + 10%)	31.8%
1970	$1,418,924	$1,112,024	$279,000	$306,900 ($279,000 + 10%)	27.6%

No tabulation is offered for 1971 as the record contains incomplete figures as a result of the termination of the "scheme".

The Gross Billings were stipulated by the government (Tr. 174), the "Kickback" figures are set forth in the indictment (A. 6-14), and the testimony. The additional 10% necessary to get the cash needed was testified to by Sol Steinman (Tr. 275). The percentages are merely the mathematical calculation of the figures.

If Moe Steinman's testimony is accepted, the percentages would double. Steinman testified that he charged double the amount of the kickback to take into account the taxes he had to pay on the apparent income he received (Tr. 135). Thus, Steinman's company had to inflate the price of meat to Hills by double the amount of the kickback in order to pay the kickbacks, pay the 10% conversion fee and pay the taxes on the apparent income Transworld received in order to preserve the cost of the meat plus his profit on the sale (Tr. 196). Steinman's testimony, if taken literally, therefore, results in the kickback exceeding the cost of the meat. Thus, for example, in 1968, the actual cost of the meat would have been $439,000 and the add-on necessary to generate a kickback of $207,500 without cost to Steinman would be $455,000.

Steinman testified in the grand jury that the "kickbacks" were just as a result of Transworld sales to Hills (Tr. 234, 235). The government endorses this contention (G.B. 4, 6). Even if Hersol and Antor sales were added, the kickback percentages would range from 27.7% in 1968 to 18.3% in 1970—before an additional add-on for taxes.

included), to 35.6% (if only the Transworld business is considered, as Moe Steinman's testimony in the grand jury and the government asserts). The realities of human experience must simply reject as a possibility the inflating of the wholesale price of meat by those percentages, in a large supermarket chain where the prices are scrutinized by executives and comptrollers (for competitive purposes), thousands of employees, comparison shoppers and hundreds of thousands of customers whose loyalty to a supermarket—since it is not a personal business—is strictly on the basis of quality and price. The same is true as to each of the percentages that would have resulted in the other years. They are simply too incredibly large to have existed.

If the above are not critical defects in the sufficiency of the government's evidence under the test of *United States* v. *Taylor*, *supra*, due process requirements, fairness and justice make them so. Any court reviewing "the entire record" cannot ignore the stench of untruthfulness that emanated from the testimony of Moe Steinman which makes that testimony inherently incredible. This is especially true since the limitless speculation of the jury must be generated by this elusive and uncorroborated testimony.

Following his vague litany, Moe Steinman acknowledged that he was a regular and habitual liar. Thus, he arrogantly proclaimed from the witness stand:

> "Q: And you don't lie, is that correct, Mr. Steinman?
>
> A: Oh, I lie plenty of times." (Tr. 262-63)

Significantly, the lies in which he habitually engaged were directly similar to the testimony he was giving in the in-

stant case, to wit, claiming to have made kickbacks to supermarket buyers when in fact none were made:

"Q: Did you ever bribe supermarket buyers on behalf of Iowa Beef?

A: No, I did not.

Q: Did you tell Iowa Beef that you needed additional money from them so that you could bribe?

A: Yes, I did.

Q: But you did not bribe?

A: That's right.

• • •

Q: And in order to get a larger brokerage you told Iowa Beef that you had to bribe union officials and supermarket buyers, right?

A: Yes, when we were negotiating, they offered me twenty five cents a hundred weight.

I said, 'It's not enough' and I told them the reason why. That was my selling point, but I never did bribe union officials nor supermarket buyers. I didn't have to.

Q: In other words, you just told that to Iowa Beef to get more money out of them?

A: To get a larger brokerage fee." (Tr. 137-38)

Sol Steinman also testified that this was a regular practice for extracting monies from meat suppliers—which money was pocketed by Moe Steinman and himself, and that the practice even extended to cheating his own partner out of money by falsely telling him that it was necessary to pay kickbacks to the meat buyer for Daitch-Shopwell (Tr. 285-86). As Moe Steinman admitted, no such kickbacks were ever paid (Tr. 139). The rationale or justification

for obtaining money by such lies was offered by Moe Steinman from the witness stand:

> ". . . that was my selling point. . . ." (Tr. 136)
>
> ". . . that was my selling point, but I never did bribe union officials nor supermarket buyers. I didn't have to." (Tr. 138)

Aside from wondering what induced Steinman to pay large sums as kickbacks in this case that obviously "he didn't have to" one can only consider if the same "selling point" was dredged up to extricate himself from his own difficulties with the government. Certainly one who would fabricate such a story to obtain money would have no compunction in doing so when his entire future is involved.

As to the supposed corroborating witness, to only one of 36 possible transactions,* it must be recalled that Sol Steinman had been named as a defendant in a ninety-nine count indictment, and that said indictment had been dismissed at the request of the government and Sol Steinman obtained complete freedom from prosecution under a plea bargain made by the government with Moe Steinman (Tr. 33-36, 152, 154). The essence of the bargain was that Moe Steinman would plead guilty to a single count of filing a false return, 26 U.S.C. §7206(1), and receive a recommendation from the government of a maximum sentence of one year's incarceration (the sentence applicable to a mis-

* The testimony of Sol Steinman differed from that of Moe with regard to the year in which the transaction took place; where the parties first met; how the parties proceeded to Coletta's home; where the payment actually took place and who counted the money. Neither Moe nor Sol Steinman stated that any of the money was received by Coletta nor could either reasonably explain the purpose of Sol's presence or why he had traveled from New Jersey to attend a meeting from which he normally was excluded by Moe (Tr. 247).

demeanor). The plea was entered in a case unrelated to the present one.

Not a shred of documentary evidence was produced to substantiate any of the generalities offered by Moe Steinman, nor a record of any payment, or even of the existence of the vast funds originally in Steinman's possession which he used to pay kickbacks. Ironically, Steinman acknowledged that the record existed as to both. However, each Steinman acknowledged that the "kickback records" had been deliberately destroyed by them (Tr. 205, 286) and the records of cash conversion activities, *i.e.*, false invoices and cancelled checks, had been destroyed in the unsolved act of vandalism which had coincidentally occurred on the eve of the execution of a search warrant for those records by the District Attorney's Office of New York County (Tr. 180-81, 287-88).

In addition, the testimony of the government witnesses is so lacking in specificity that it scrupulously avoids any assertion of hard detail that could be demonstrated as false, even though such proof may exist in abundant quantities. Since no precise date or time is ever presented the defendant is precluded from producing an alibi if one exists. The same is true with regard to location *vis-a-vis* time and place. No evidence being precisely presented as to the source of the funds, the defendant cannot graphically attack their non-existence. The government witnesses having destroyed all records, the defendant cannot demonstrate how the records conflict with their testimony, if in fact they would have.

In short, by Moe Steinman's carefully tailored testimony that avoids the possibility of direct refutation, Coletta is *de facto* deprived of his rights to confront his accusers, and is relegated to having his life and liberty determined by a swearing contest, since there is no such thing as "proving" a negative, *i.e.*, that he did not receive the money.

In sum, concerns for due process, fairness and justice require more than that, and dictate that an indictment based upon such evidence cannot stand, and is properly dismissed.

Conclusion

The order dismissing the indictment should be affirmed.

Respectfully submitted,

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